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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1359 84

UNITED STATES OF AMERICA, *Appellant*,

v.

MILAN VUITCH, M.D., *Appellee*.

On Appeal From the United States District Court for the District of Columbia

SUPPLEMENTAL MEMORANDUM OF APPELLEE

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SUPPLEMENTAL MEMORANDUM OF APPELLEE

PRELIMINARY STATEMENT

This Supplemental Memorandum of Appellee is respectfully submitted in response to the Court's request of both parties to submit a memorandum as to whether the appeal provisions of Title 18 U.S.C. 3731 are applicable to the statute here involved (D.C. Code, Section 22-201, fully set forth at page 2, Appellee's Motion to Affirm) or whether the provisions of Title 18 U.S.C. 3731 apply only to a Federal enactment of general applicability.

STATUTE INVOLVED

Title 18 U.S.C. 3731 (as revised) provides: "§ 3731. *Appeal by United States*

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

* * *

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States

which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any court of appeals, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court."

QUESTION PRESENTED

Does this Court have jurisdiction to entertain a direct appeal from a decision of the United States District Court for the District of Columbia dismissing an indictment on the ground of the invalidity of the statute upon which the indictment is founded, where that statute, although an Act of Congress, applies only in the District of Columbia?

JURISDICTION OF THIS COURT

Legislative History

The original Congressional enactment of which Section 3731 is the effective present law was a statute of March 2, 1907[1] and became Title 18, United States Code (1940 Ed.), Section 682. In 1949, Congress by its Act of May 24, 1949, substituted the word "invalidity" for the word "validity" following the words "upon the" in the second paragraph of Title 18

[1] C. 2564, *et seq.*

U.S.C., Section 3731. Certain other language, not relevant to this discussion, was conformed.

Construing Title 18 U.S.C. 682 this Court in 1933 reviewed the provisions of the present section in *United States* v. *Burroughs*,[2] and was faced with the question as to whether or not the Criminal Appeals Act encompassed cases triable in the former existing Supreme Court of the District of Columbia. This Court stated that in 1901 Congress adopted the D.C. Code and sanctioned appeals from the then Police Court and the then Supreme Court of the District of Columbia to the Court of Appeals for the District of Columbia.[3] Section 935 of that appellate D.C. statute, provided, *inter alia*, "in all criminal prosecutions, the United States or the District of Columbia . . . shall have the same right of appeal that is given to the defendant. . . ." In 1907, the Criminal Appeals Act was passed, authorizing an appeal by the United States from the United States District Court for the District of Columbia and the Court of Appeals directly to this Court "in all criminal cases" specified. This Court in the *Burroughs* case made clear that the 1907 Act superseded Section 935 of the D.C. Code, adding "we are of the opinion that the Criminal Appeals Act is inapplicable to criminal cases tried in the Supreme Court of the District of Columbia. These are regulated solely by Section 935 of the Code." Thus, in 1933, the law was that the former Supreme Court of the District of Columbia was not in legal effect a United States District Court and since the Criminal Appeals Act used the phrase "District Courts" and not "Courts of the United States" (the

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[2] 289 U.S. 159, 53 S. Ct. 574 (1933).

[3] 31 Stat. 1189, U.S.C., Chap. 854.

language used by the empowering Act creating the District of Columbia Supreme Court) the then United States Circuit Court of Appeals for the District of Columbia, had jurisdiction of appeals at that time.

However, in 1942, the Criminal Appeals Act was amended to specifically include the District of Columbia Court of Appeals as "in the opinion of such Court the appeal should have been taken directly to the United States Supreme Court." In its opinion in *United States* v. *Hoffman,*[4] the Court of Appeals for the District of Columbia Circuit stated "it was held in *United States* v. *Burroughs* that the Criminal Appeals Act did not apply to the District of Columbia." But the Act had been further amended in 1942 and under its present provisions appeals to the Supreme Court from "all" or "any" District Court decision "invalidating" a statute on constitutional grounds, as will more fully be seen below, are authorized. Section 128 of the Judicial Code, as amended,[5] gives this Court power to review judgments of the District Court in criminal cases on appeals taken by the United States "in cases where such appeals are permitted by law. This latter clause was part of the Act amending the Criminal Appeals Act in 1942, and clearly brings this Court within the terms of that amended statute" (*Hoffman, supra*). The Court of Appeals thus, in *Hoffman,* held that the appeal there involved should go directly to the Supreme Court as a result of this reasoning.

Except for the Omnibus Crime Control and Safe Streets Act of 1968, which made, *inter alia,* the sup-

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[4] 82 U.S. App. D.C. 153, 161 F.2d 881 (1947).

[5] 56 Stat. 272, 28 U.S.C.A., Section 225(f).

pression of evidence reviewable by the Courts of Appeal, and in other respects not relevant here, Title 18 U.S.C. 3731 has not been amended.

A review of the legislative history of the Criminal Appeals Act demonstrates that former Title 18 U.S.C., Section 682, as construed in *United States* v. *Burroughs, supra,* yields to the United States as a party the right of appeal directly to this Court "from any decision or judgment of the District Court of the United States quashing, setting aside, or sustaining a demurrer to any indictment or any count thereof where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment was founded." The House of Representatives, Judiciary Committee, in commenting upon old Section 682 stated:[6]

> "This law will have the effect of permitting the Government to appeal in criminal cases to the circuit court of appeals from a decision or judgment of a district court quashing, setting aside, or sustaining a demurrer or plea in abatement to any indictment or information where the validity of the statute or construction of the statute upon which the indictment is founded is not involved. Under the existing law the only provision for appeal from a judgment of the court sustaining a demurrer to an indictment is in those cases in which the decision sustaining the indictment is based upon the validity of the statute or a construction of the statute.
>
> The amendments to the existing law which this legislation will accomplish were recommended by the Attorney General.
>
> It has been the practice in our criminal jurisprudence to surround the accused with many safe-

[6] H. Rep. No. 45, February 7, 1942.

guards. As a result of this practice the amendments proposed in this bill have not hitherto been enacted into law. These amendments may impose upon a defendant in a criminal case the burden of expense of contesting an appeal and the hardship of having an indictment or information outstanding against him. Nevertheless your committee feels that the Government should have the right to appeal to the circuit court of appeals from the district court from decisions on demurrers or pleas in abatement to indictments or informations in cases involving the sufficiency of the allegations in the indictments or informations in the same manner in which the Government may now appeal from decisions on demurrers to indictments direct to the Supreme Court in those cases involving the invalidity of a statute or the construction of a statute."

Thus, the legislative history of former Section 682 makes it abundantly clear it was the original intent of Congress to give the Government the same right of appeal in certain instances to the Circuit Courts of Appeal "in the same manner in which the Government may make appeal from decisions on demurrers to indictments direct to the Supreme Court in those cases involving the invalidity of a statute or the construction of a statute".

The language of the present Section 3731 is clearly unambiguous. Its effect is to treat the U.S. District Court for the District of Columbia as it does other, equally competent federal district courts. In the first paragraph, which provides for an appeal from the United States District Court directly to this Court, the language is "in *all* [emphasis supplied] criminal cases in the following instances". The word "all" on its face provides no exceptions for United States

District Courts in the District of Columbia as distinguished from United States District Courts in other jurisdictions.

Similarly, the second paragraph of Section 3731 provides for such appeal by the Government from a decision or judgment setting aside or dismissing "*any*" [emphasis supplied] indictment, where such a decision or judgment is based on the invalidity or construction of the statute on which the indictment is based. In the case at bar, it is clear from the Memorandum Opinion filed by United States District Judge Gesell[7] that 22 D.C. Code 201 was held to be unconstitutionally vague, and accordingly, Appellee's motion to dismiss the indictment in the District Court on the grounds of its unconstitutionality had been granted. A reading of that Opinion clearly demonstrates that it is "a decision or judgment . . . dismissing any indictment . . . where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

Applicability of the Criminal Appeals Act to United States District Court for the District of Columbia

While Section 3731 has been held by this Court to be strictly construed against the Government's right of appeal,[8] this Court has often held that as to "instances" specified in the statute, this Court has the jurisdiction to review a United States District Court decision or judgment that a Federal statute, such as the one at bar, is unconstitutional. Former Section

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[7] App. A to Appellant's Jurisdictional Statement (pp. 9-15); 305 F. Supp. 1032 (D.D.C. 1969).

[8] *Will* v. *United States*, 389 U.S. 90, 88 S.Ct. 269 (1967).

682 did not apply to the District of Columbia or repeal the District of Columbia Appellate system, but Section 3731 has been construed to so apply.

The application of the Criminal Appeals Act, as has been noted, is strictly limited to the instances specified.[9] In *United States* v. *Borden Company*,[10] this Court helpfully summarized the general principles it will follow in exercising this jurisdiction under Section 3731:

1. "Appeal does not lie from a judgment which rests on the mere deficiency of the indictment as a pleading, as distinguished from the construction of a statute which underlies the indictment."[11] It is clear that in the case at bar the holding of the lower court was based solely upon the construction or invalidity placed upon 22 D.C. Code 201.

2. Nor will an appeal lie in a case where the District Court has considered the construction of the statute but has also rested its decision upon the independent ground of a defect in pleading "which is not subject to our examination. In that case, we cannot disturb the judgment and the question of construction becomes abstract." (*United States* v. *Borden, supra*). In the case at bar, it is clear that the District Court has not concerned itself with defects in pleadings but has held 22 D.C. Code 201 unconstitutional.

3. This Court "must accept the construction given to the indictment by the District Court as that . . .

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[9] *United States* v. *Mersky*, 361 U.S. 431, 80 S.Ct. 459 (1960).

[10] 308 U.S. 188, 193, 60 S.Ct. 182 (1939).

[11] See also *United States* v. *Hastings*, 296 U.S. 188, 192-194, 56 S.Ct. 218 (1935).

matter we are not authorized to review." (*U.S.* v. *Borden, supra*).[12]

4. If the indictment does not allege a violation of the statute and such is found to be the case by the District Court "that is necessarily a construction of the statute." (*United States* v. *Borden, supra*).[13]

5. "When the District Court has rested its decision upon the construction of the underlying statute . . . this Court is not at liberty to . . . consider other objections to the indictment. The Government's appeal does not rest upon the whole case." [14]

Carroll v. *United States*[15] reviews the history of the Criminal Appeals Act as to appeals taken by the United States in the District of Columbia. In this case, this Court stated:

> "It may be concluded, then, that even today criminal appeals by the Government in the District of Columbia are not limited to the categories set forth in 18 U.S.C. 3731, although as to cases of the type covered by that special jurisdictional statute, its explicit directions will prevail over the general terms of § 935, now found in the District of Columbia Code, 1951 Edition as § 23-105. *United States* v. *Hoffman,* 82 U.S. App. D.C.,

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[12] See also *United States* v. *Carbone,* 327 U.S. 633, 66 S.Ct. 734 (1946).

[13] See also *United States* v. *Southeastern Underwriters Association,* 322 U.S. 533, 164 S.Ct. 1162 (1944).

[14] *United States* v. *Petrillo,* 332 U.S. 1, 5, 67 S.Ct. 1538 (1947).

[15] 354 U.S. 394 (1957), 77 S.Ct. 1322 (1957).

53, 161 F. 2d 881, decided on merits, 335 U.S. 77."[16]

An appeal from a decision based on the invalidity or construction of the underlying statute, as here, is the result of a motion to dismiss the indictment made prior to trial. Thus, no verdict has been rendered in favor of either side. But if one had been rendered against the defendant, this appeal would not lie. The former statute, Section 682, made this point explicit by providing that the Government could not take an appeal in any case where there has been a verdict in favor of the defendant.[17]

In *United States* v. *Cefaratti* (91 U.S. App. D.C. 297, 202 F. 2d 13 (1952), cert. den. 345 U.S. 907, 73 S.Ct. 626, overruled in part by *Carroll* v. *United States, supra*) the United States Court of Appeals for the District of Columbia considered the question of an appeal by the Government from the granting of a motion to suppress by the United States District Court. It said, in part:

> "it follows that, insofar as now material, the right of appeal of the United States is confirmed by the provision of the Federal Judicial Code that 'the Courts of Appeal shall have jurisdiction of

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[16] In *United States* v. *Waters*, 84 U.S. App. D.C. 127, 128-129, 175 F. 2d 340 (1948) the Court of Appeals for the District of Columbia stated that where a judgment of the United States District Court for the District of Columbia was "based upon the invalidity or construction of the statute upon which the indictment is founded" the Government must take its appeal directly to the Supreme Court". The offense here involved was a violation of D.C. Code (Supp. V 1946) Section 22-3204, not a federal statute of general applicability.

[17] *United States* v. *Weissman*, 266 U.S. 377, 45 S.Ct. 135 (1924).

appeals from all final decisions of the District Courts of the United States . . . except when a direct review may be had in the Supreme Court."

CONCLUSION

There is nothing in the language of Title 18 U.S.C. 3731 nor in the legislative history of this statute to suggest that subsequent to the 1942 enactment, the United States does not have the right of direct appeal to the Supreme Court from a final decision of the United States District Court for the District of Columbia invalidating a Congressional enactment. Thus, we respectfully submit that the Court has jurisdiction of the present appeal, and should grant Appellee's Motion to Affirm.

Respectfully submitted,

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